LIM SIEW NEO (f) v. PANG KEAH SWEE

[J. C. (Lord Reid, Lord Somervell of Harrow, and the Rt. Hon. L. M. D. de Silva) December 9, 1957]

[Privy Council Appeal No. 17 of 1956]

Landlord and Tenant — Sub-letting — Whether there was prohibition — Control of Rent Ordinance, 1947, s. 15(1).

Costs — Appeal to Privy Council — Printed record — Inclusion of irrelevant matter — Unnecessary expense — Deduction from costs.

This was an appeal from a judgment of the Court of Appeal of Singapore dismissing an appeal from a judgment of the lower Court by which the respondent was granted an injunction restraining the appellant from making excessive noise or permitting the escape of water, dirt or noxious liquid as to cause a nuisance to the respondent in his occupation of the ground floor of the premises in question. Her ground of appeal was that the respondent was not entitled to occupy the premises and was a trespasser. The respondent maintained that his occupation was lawful and was protected by the Control of Rent Ordinance, 1957.

The house belonged to the appellant. In 1945 it was let to one Madam Toy by an oral agreement. In 1947 the respondent entered into occupation of the ground floor. In 1951 Madam Tay vacated the premises. The appellant required the respondent to vacate but he refused to do so on the ground that it had been sublet to him by Madam Tay and was therefore protected by section 15(1) of the Control of Rent Ordinance. The appellant did not take legal proceedings but she tried to make him leave by a course of interference with his peaceful occupation. The respondent took an action for injunction. One of the defences by the appellant was that the respondent had no right to occupy the premises because subletting by Madam Tay was prohibited by the terms of her lease. She said that she had told Madam Tay that she would not be allowed to sublet and that Madam Tay had agreed to her term. In 1947 she said that she had seen the respondent come in and open the shop and when asked Madam Tay told her that the respondent was in partnership with her.

At the trial evidence was given by appellant's solicitor that in 1947 she had consulted him to see whether she could recover possession of the premises. He then said that the appellant also told him that Madam Tay had been told that she could have the use of the premises provided she did not sublet: the appellant also told him that she suspected subletting. The solicitor advised her that as there was only a verbal arrangement about subletting she might find it difficult to prove successfully her case in Court. The learned trial Judge admitted the evidence not as to what had been said in 1945 but for its circumstantial value as to appellant's state of mind with regard to the existence of a prohibition when she sought legal advice in 1947. He held that the balance of probabilities was that there was a prohibition against subletting in the oral contract. But he decided the case in favour of the respondent because he held that although it was not unlikely that in 1947 appellant believed that respondent was a partner of Madam Tay, she had realised for a considerable time before 1951 that he was a subtenant and had acquiesced in the situation and had thereby waived the breach of the agreement against subletting. He also held that it was competent to prove appellant's state of mind in 1947 about what had been agreed in 1945. The Court of Appeal held that the learned Judge had misdirected himself.

Held: Although the Board did not wholly agree with the grounds of judgment in the leading judgment of Taylor J. the Court of Appeal reached the correct conclusion.

Their Lordships found that considerable unnecessary expense had been incurred in this case by including in the printed record notes of counsel's arguments and certain preliminary matter not relevant to the subject matter of the appeal. Their Lordships had been informed by counsel that the appellant's advisers wished to omit these parts of the record but the respondent's advisers required their inclusion. Their Lordships held that the usual order for costs must be modified so that the cost of printing this part of the record did not fall on the appellant.

[Editorial Note: See note on this case at p. xliv **supra.**]

Cases referred to :—

(1) *Gillie v. Posho* (1939) 2 All E.R. 196.

(2) *R. v. Benjamin* 8 Cr. R. 146.

(3) *Stephenson v. Tyne Commissioners* (1869) 17 W.R. 590.

PRIVY COUNCIL APPEAL.

J. P. Widgery for the appellant.

M. O'C. Stranders for the respondent.

The judgment of their Lordships was delivered by :—

Lord Reid : — This is an appeal from a judgment of the Court of Appeal of Singapore, dated 1st July, 1955, dismissing an appeal from a judgment of Whitton J., by which the present respondent was granted an injunction restraining the present appellant from making excessive noise or permitting the escape of water, dirt or noxious liquid so as to cause a nuisance to the respondent in his occupation of the ground floor of No. 265, Orchard Road, Singapore. It is not now maintained by the appellant that the facts do not justify the granting of this injunction. The ground of her appeal is that the respondent is not entitled to occupy the premises and is a trespasser. The respondent maintains that his occupation is lawful and is protected by the Control of Rent Ordinance, 1947.

The house, No. 265, Orchard Road, belongs to the appellant. In 1945, when the house belonged to her mother but was managed by the appellant, the appellant let the whole house to Madame Tay by an oral agreement. In 1947 the respondent entered into occupation of the ground floor which he has since used as a dispensary or chemist's shop. The first floor was occupied by one Teo and Madame Tay remained in occupation of the top floor. In 1951 Madame Tay gave notice to quit : on 31st March she vacated the top floor and later in the same year Teo vacated the first floor. The appellant required the respondent to vacate the ground floor but he refused to do so on the ground that it had been sub-let to him by Madame Tay and that his tenancy was protected by section 15(1) of the Control of Rent Ordinance, 1947. That sub-section is in the following terms :—

"15.—(1) No judgment or order for recovery of possession shall be enforced as against the sub-tenants (if any) of the tenant of the premises where the tenant was not prohibited from subletting by the terms of his

tenancy and every such judgment or order shall declare whether it may be enforced as against such sub-tenants."

It is not now disputed that Madame Tay did sub-let the ground floor to the respondent. The main question in the case now is whether Madame Tay was prohibited from sub-letting by the term of the oral lease to her of 1945. If she was not so prohibited then admittedly the Control of Rent Ordinance applies and this appeal must fail.

When the respondent refused to quit in 1951 the appellant did not take legal proceedings but she tried to make him leave by a course of interference with his peaceful occupation. The respondent then raised the present action. One of the defences was that the respondent had no right to occupy the premises because sub-letting by Madame Tay was prohibited by the terms of her lease. At the time of the trial Madame Tay could not be found. The respondent could give no evidence about the terms of the lease and the only direct evidence was that of the appellant. She said that she had told Madame Tay that she would not be allowed to sub-let and that Madame Tay had agreed and had promised to give the premises back after two years. In 1947 she said that she had seen the respondent come in and open the shop and had asked Madame Tay about it but had been told by her that the respondent was in partnership with her. It appears that the appellant spoke to the respondent on several occasions but did not ask him whether he was a sub-tenant or Madame Tay's partner.

Whitton J., said with regard to the appellant: "I was not so favourably impressed by Miss Lim's demeanour in the witness box that I am prepared to accept her unsupported word on any of the material points in issue". There was ample ground on which he was entitled to reach this conclusion. Nevertheless he held that it had been proved that there was a prohibition against sub-letting in the oral contract.

At the trial evidence was given by Miss Lim's solicitor, Mr. Boswell. He said that in 1947 the appellant consulted him to see whether she could recover possession of the premises. Objection was taken to his giving evidence of what the appellant then told him but the learned Judge ruled that the evidence was admissible as indicating the appellant's state of mind when she instructed Mr. Boswell in 1947 as to the existence or otherwise of the covenant against sub-letting but that it was without value as to what actually transpired between her and Madame Tay in 1945. Mr. Boswell then said that the appellant told him that Madame Tay had been told that she could have the use of the premises provided she did not sub-let: the appellant also told him that she suspected sub-letting. Mr. Boswell advised her that as there was only a verbal arrangement about sub-letting she might find it difficult to prove successfully her case in Court..

The learned Judge said with regard to this evidence: "I do think the circumstance that she went in 1947 to consult her then solicitor Mr. Boswell, whose careful testimony I accept unreservedly, about recovery of the premises provides substantial corroboration that the arrangements made in 1945 were as she has told the Court". Later he said that the evidence was admissible not as to what had been said in 1945 but for its circumstantial value as to Miss Lim's state of mind with regard to the existence of a prohibition when she sought legal advice in 1947. He then held that the balance of probabilities was that there was a prohibition against sub-letting in the oral contract. But he decided the case in favour of the respondent because he held that although it was not unlikely that in 1947 Miss Lim believed that the respondent was a partner of Madame Tay, she had realised for a considerable time before 1951 that he was a sub-tenant and had acquiesced in the situation and had thereby waived the breach of the agreement against sub-letting. It appears to their Lordships that the learned Judge would not have found the existence of the prohibition against sub-letting proved without the evidence of Mr. Boswell. He held that it was competent to prove Miss Lim's state of mind in 1947 about what had been agreed in 1945. Whether or not he intended to use the word "corroboration" in a technical sense, he appears to have thought that with this evidence he no longer had to depend on the appellant's "unsupported word" in finding that the prohibition had been proved.

The Court of Appeal held that the learned Judge had misdirected himself. Their Lordships do not wholly agree with the grounds of judgment in the leading judgment of Taylor J., but in their opinion the Court of Appeal reached the correct conclusion. All that Mr. Boswell's evidence could establish was that in 1947 the appellant believed — or rather that she said to him — that two years previously she had said certain things to which Madame Tay agreed. That might disprove any suggestion that her evidence had been recently fabricated but it left the truth of what she told Mr. Boswell depending entirely on her unsupported word. In their Lordships' judgment this evidence should not have been admitted. It is plainly not part of *res gestae* and it is a firmly established rule of the law of evidence that it is not competent to corroborate or reinforce evidence in the witness box by proving that the witness made a similar statement to a third party on some previous occasion. If authority be

required their Lordships need not go beyond the decision of the Board in *Gillie v. Posho*[1].

It was argued that certain cross-examination of the appellant amounted to a charge that her evidence had been recently fabricated. The appellant was not asked in re-examination whether she had told the same story to Mr. Boswell and their Lordships need not consider whether that would have been competent. It is another matter to lead the evidence of another witness to show that for a long time before the trial the witness has told the same story. Two cases were cited. In *R. v. Benjamin*[2] a challenge to a witness was met by production of notes made by him. In *Stephenson v. Tyne Commissioners*[3] it was held competent to reinforce opinion evidence given by an expert by proving that he had acted on the opinion which he gave in the witness box. These cases are far removed from the circumstances of the present case and do not appear to qualify the general rule.

If their Lordships were of opinion that the decision of the trial Judge regarding the prohibition against sub-letting really depended on his assessment of the credibility of the appellant they would be most unwilling to disturb that decision. But they are satisfied that his decision arose from his misdirecting himself as to the competency and effect of Mr. Boswell's evidence. Accepting the learned Judge's assessment of credibility they must hold that it has not been proved that there was any prohibition against sub-letting in Madame Tay's lease and that therefore the respondent's tenancy is protected by the Control of Rent Ordinance.

Their Lordships regret to note that considerable unnecessary expense has been incurred by including in the printed record notes of counsel's arguments and certain preliminary matter not relevant to the subject matter of this appeal. Their Lordships have been informed by counsel that the appellant's advisers wished to omit these parts of the record but that the respondent's advisers required their inclusion. The usual order for costs must be modified so that the cost of printing this part of the record does not fall on the appellant.

Their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the costs of the appeal subject to deduction of the cost of printing those parts of the record which should not have been included.

Appeal dismissed.

Solicitors: *Speechly, Mumford & Craig; Sydnet Redfern & Co.*

P. T. PELAJARAN NASIONAL INDONESIA v. JOO SEANG & CO. LTD.

[O. C. J. (Rigby J.) October 4, 1957]

[Penang — Originating Summons No. 172 of 1957 in Civil Suit No. 53 of 1957]

Practice and Procedure — Service of Writ of Summons — Strict compliance with procedure — Setting aside judgment obtained in default.

Companies — Registered office — Service of Writ of Summons — Companies Ordinance, 1940, ss. 93(2), 109 and 319.

In this case the defendants sought to set aside a final judgment entered by the plaintiffs in default of defendants' appearance. The plaintiffs were a company constituted and incorporated in Indonesia, and had places of business in both Singapore and Penang. The defendants were a company incorporated in the Federation of Malaya and, according to the statement of claim, had its principal place at No. 144 Beach Street, Penang. Some time in 1954 the plaintiffs entered into an agreement with the defendants whereby the defendants were to act as their agents on a commission basis. In May 1956 the plaintiffs, after obtaining particulars of the defendants from the Registrar of Companies, including the statement that the situation of the registered office of the defendants was at 144 Beach Street, Penang, addressed a Notice of Action to the defendants demanding payment of a sum of $116,409.84 allegedly due to them and threatening legal proceedings if the money was not paid within a stipulated period. The notice was returned with a covering letter addressed at 144 Beach Street and signed by the Managing Director of Joo Seang & Co. Ltd. stating, *inter alia*, that the notice was "apparently meant for Messrs. Joo Seang & Co." When the notice was again returned to them, the defendants denied the existence of any agreement between themselves or any representative acting on their behalf and the plaintiffs. Subsequently the plaintiffs took out a Writ of Summons and on the strength of the information already received from the Registrar of Companies the Writ was served at what had been stated to be the company's registered office at 144 Beach Street. The Summons was returned to the plaintiffs' solicitors by Joo Seang & Co. of that address stating that Joo Seang & Co. Ltd. were "no more at the above address having since removed." The plaintiffs, after confirmation by the Registrar of Companies that the defendants' registered office was at 144 Beach Street, obtained final judgment against them in default of appearance in the sum of $116,409.84 and costs. On July 1, 1957 the plaintiffs' solicitors again wrote to the Registrar of Companies requesting particulars of the defendants firm and in reply the Registrar, for the first time, stated that the "Situation of Registered Office — 146, Beach Street Penang." Subsequently the Registrar disclosed that "When I advised you on 9th April 1957 that the address was 144 Beach Street, Penang, it was not noticed at that time that on 7th February 1955 the Company did in fact give notice to this Registry that its registered office was at 146 Beach Street, Penang, since 1st February 1955." On July 22, 1957 the defendants applied by Summons-in-Chambers for the judgment obtained in default of appearance to be set aside. An affidavit was filed in support of that application by the Managing Director of the Company which *inter alia* alleged that he had no knowledge of the existence of the suit until the 13th July 1957 when he was handed a copy of the judgment obtained in default of appearance by the process server of the plaintiffs' solicitors.

Held: (1) where the law provides a particular method or form of procedure for effecting service, or a particular place at which, or to which, service may be effected, then there must be strict compliance with those provisions, and the Court would set aside a judgment